
In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a Writ of
Habeas Corpus of FRED RAYMOND KOENIG,
Appellant,

v.

JOHN R. CRANOR, As Superintendent of the
Washington State Penitentiary at Walla
Walla, Washington, *Appellee.*

No. 12551

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

On December 18, 1948, appellant applied to the Supreme Court of the State of Washington for a writ of habeas corpus to examine into the cause of his detention in the Washington State Penitentiary on a judgment and sentence pursuant to a conviction of the crime of carnal knowledge. The petition was denied without opinion by an order of the Supreme Court in Cause No. 30869, dated

and filed January 21, 1949, with judgment entered in Journal 38 at page 460 in the office of the clerk for the Supreme Court of the State of Washington. Thereafter appellant made application in the Supreme Court of the United States for a writ of certiorari to the Supreme Court of Washington. This petition was denied June 20, 1949, *Koenig v. Smith*, 337 U. S. 942, 69 S. Ct. 1497, 93 L. Ed. 1746.

On December 16, 1949, appellant petitioned the District Court of the United States for the Eastern District of Washington for a writ of habeas corpus (Tr. 1). An order to show cause was entered (Tr. 23) and hearings were held on said order on January 4, 1950 (Tr. 46-62), and February 23 and 24, 1950 (Tr. 73-243). An order denying the writ was entered April 11, 1950 (Tr. 422). Thereafter, appellant was granted a certificate of probable cause by the District Court (Tr. 427). As authority for this appeal, appellant refers to Sections 225, 452 and 463 of former Title 28, U. S. C. (Appellant's Opening Brief, page 1). These sections were repealed by act of June 25, 1948, C. 646, § 39, 62 Stat. 992, eff. September 1, 1948, and replaced by Sections 41, 43, 1254, 1291, 1292, 1293, 1294, 2241 and 2253, New Title 28, United States Code. Appellant contends he is held in custody in violation of the Constitution of the United States (Appellant's Opening Brief, page 1), which is a proper ground for invoking the jurisdiction of the United States District Court under 28 U. S. C. 2241. However, it is appellee's position that the District Court did not have jurisdiction for the reason that appellant did not exhaust all the remedies available to him under the laws of the State of Washington as required by 28 U. S. C. 2254. This will be discussed in detail in appellee's argument in support of the order of the District Court denying the writ.

STATEMENT OF THE CASE

Appellant is confined in the custody of appellee herein pursuant to a valid judgment of the Supreme Court of the State of Washington dated January 7, 1946, adjudging appellant guilty of the crime of carnal knowledge of a female child of 13 years and imposing as punishment therefor a maximum term of imprisonment of twenty years (Tr. 422). The substance of appellant's contentions is that he has been deprived of his liberty without due process of law. This appeal is based on what he alleges were errors occurring at his hearings in the District Court on his application for a writ of habeas corpus, which errors, he avers, are sufficient to warrant a reversal of the District Court's order denying said application. It is appellee's position that the errors assigned by appellant did not, in fact, take place or were not errors in law sufficient to justify the reversal of the order of the District Court.

ARGUMENT

I.

The District Court did not have jurisdiction to entertain appellant's application for a writ of habeas corpus because appellant had not exhausted his state remedies at the time of petitioning for a writ of habeas corpus in the District Court.

Federal courts do not have the power to grant an application for a writ of habeas corpus on behalf of a person detained pursuant to a judgment of a state court until such person has exhausted his remedies in the courts of the state before making application in a court of the United States. 28 U. S. C. 2254 provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The certificate of the deputy clerk of the Washington State Supreme Court (Tr. 406-407) states that appellant applied to the Supreme Court of the State of Washington on two occasions for a writ of habeas corpus. An application was made to the United States Supreme Court for a writ of certiorari to the Washington State Supreme Court on the latter of the above mentioned petitions. The petition for certiorari was denied by the Supreme Court of the United States on June 20, 1949. The records of the

Washington State Supreme Court as certified by the deputy clerk of said court disclose that the appellant made no appeal from his conviction in the criminal cause and disclose that no appeal was taken from any order of a superior court denying appellant's application for a writ of error *coram nobis*. This court has held in the cases of *Barton v. Smith*, 162 F. (2d) 330, and *Hampson v. Smith*, 162 F. (2d) 334, that a person confined in the State of Washington pursuant to a judgment of a court of the state must seek relief by applying for a writ of error *coram nobis* to the state court even though the precise ambit of the writ has not been marked by the Washington Court. A writ of error *coram nobis* is thus considered to be a remedy available to persons confined in the State of Washington within the meaning of 28 U. S. C. 2254. Appellant claims that the laws of the State of Washington are inadequate to protect his rights because the courts of the state refuse to follow the state law in respect to appellant (Appellant's Opening Brief, page 2).

Impliedly, appellant admits that there is not an absence of available state corrective process, but insists that circumstances exist which render such process ineffective to protect his individual rights. However, the record discloses no circumstances justifying this contention. The state procedure being adequate and available, the failure of appellant to apply for a writ of error *coram nobis* or to appeal a denial of such a writ to the Washington State Supreme Court must bar such appellant from applying for a writ of habeas corpus in a federal district court.

II.

Each of Appellant's Specifications of Error is not supported by the record or does not state facts sufficient to reverse the order of the District Court.

Appellant has assigned a number of errors as grounds for reversing the order of the District Court. (Appellant's Opening Brief, pages 6 and 7.) Appellee will consider each of these specifications in order.

1. Appellant contends that the court erred in "refusing to hear testimony concerning what actually had transpired before the Superior Court of the State of Washington" on appellant's trial. Appellee denies that the court refused to hear any testimony in regard to the matters which occurred at the trial. As to these matters, the appellant testified on his own behalf at the hearing in the District Court (Tr. 103-135). He was permitted to give this testimony in narrative form (Tr. 103) and was assisted by the court and by his attorney in completely and adequately presenting the subject of such allegations. Appellant also called and examined ten witnesses in regard to the criminal trial proceedings.

2. Appellant alleges that the court erred in "refusing to allow appellant to hear the full proceedings had in his own behalf." Appellee denies that the court refused to allow appellant to hear the complete proceedings at his hearings in the District Court. Appellant was present at all times during said hearings (Tr. 46-62, 73-243). Presumably appellant alludes in this specification to the remarks made to counsel for appellant and counsel for appellee (Tr. 183-185). The error, if such it be, is not reversible.

3. Appellant contends that the court erred in allowing certificates of Judges Barnett and Willis to be

admitted in evidence, and alleges that "appellant was denied the opportunity to offer their oral testimony." Appellee denies that the court erred in admitting such certificates. 28 U. S. C. 2245 provides in part:

"On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. * * *"

Appellant was granted permission to propound interrogatories to the certifying judges in the manner provided for interrogation under 28 U. S. C. 2246 (Tr. 81, 82, 225, 226, 412, 413). While he did not take advantage of this opportunity, this method of examination was available to him.

4. Appellant alleges that the court erred in "refusing to hear witnesses subpoenaed by and offered in behalf of appellant." Appellee denies that the District Court refused to hear any witnesses offered in behalf of appellant. This specification of error presumably refers to a circumstance which allegedly existed at appellant's trial in the superior court of the State of Washington in Yakima County (Tr. 55). An examination of the record of the trial proceedings fails to show that this irregularity or misconduct did occur. Moreover, the certificate of the deputy prosecuting attorney states that appellant had an opportunity to call any and all witnesses that he so desired (Tr. 375).

5. Appellant alleges that the court erred in "erroneously advising appellant that he did not desire the file cluttered up with petitions filed by appellant in other courts, then allowing appellee's counsel to offer a petition of certiorari in evidence." Appellee maintains that the

court did not err in admitting such petitions in evidence. Appellant stated that he had no objection to the admission of a copy of the petition for certiorari to the Washington State Supreme Court (Tr. 220). The receipt of evidence admitted without objection may not be raised as a ground for error on appeal.

6. Appellant alleges that the court erred in "forcing appellant to address his deputy prosecuting attorney, counsel appointed for the defense in the original action against him, as a judge upon examination." Appellee denies that the court erred in this respect. This specification presumably refers to the suggestion by the District Court that appellant proceed with the courtesy due state judges in his examination of Judge MacIver as a witness (Tr. 84, lines 18-19).

7. Appellant alleges that the court erred in "failing to consider the fact that appellant had fully carried his burden overwhelmingly in supporting his claims undisputed set out in appellant's petition and affidavit," and that the court erred in "failing to consider the fact that appellant had introduced new and undisputed evidence in support of claims not set out in the petition and affidavit." Appellee denies that the court erred in these respects. An examination of the evidence and testimony at the hearing below indicates that appellant has completely failed to establish any of his allegations in regard to violation of his constitutional rights. On the contrary, his unsupported statements to this effect were contradicted without exception by such evidence and testimony.

8. Appellant alleges that the court erred in "denying appellant's petition for a writ of habeas corpus alleging a judgment of the Superior Court when the transcript and statement record is totally silent of any evidence of a

judgment on behalf of the appellee and appellant urged no valid judgment." Appellee maintains that the court did not err in holding that appellant was held in custody pursuant to a valid judgment of the Superior Court of the State of Washington for Yakima County. Although there is no copy of the judgment and sentence of the criminal cause of the trial court, appellant's affidavit to the Supreme Court of the United States(Tr. 388-398) admits the existence of such judgment and sentence (Tr. 389).

9. Appellant alleges that the court erred in "failing to enter a finding of conclusions of law and fact on appellant's petition." Appellee denies that the court erred in this respect. The findings of fact and conclusions of law are set forth in the order of the District Court denying the petition (Tr. 422-423).

10. Appellant alleges that the court erred in "failing to grant the rehearing of petitioner and refusing to hear evidence claimed." Appellee contends that the court did not err in this respect. Appellant's petition for a rehearing failed to allege sufficient grounds for granting such rehearing (Tr. 423-425).

11. Appellant alleges the court erred in "failing to grant appellant an order to conduct research of authorities." Appellee denies that the court erred in this respect. It is sufficient to state that the order (Tr. 432-433) denying appellant's motion (Tr. 431-432) to be taken daily to a law library does not constitute error.

CONCLUSION

The order of the District Court should be affirmed for the following reasons:

The District Court was without jurisdiction to entertain an application for a writ of habeas corpus by this appellant inasmuch as this appellant has failed to exhaust the remedies available to him under the laws of the State of Washington, in particular that appellant has failed to apply for a writ of error *coram nobis* in the Supreme Court of the state; appellant has failed to allege that there is an absence of available state corrective process or shown the existence of circumstances rendering such process ineffective to protect his rights.

Appellant has failed to allege any errors of the District Court supported by the record which warrants a reversal of that court's order denying appellant's application for a writ of habeas corpus. Appellee prays that said order be affirmed.

Respectfully submitted,

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